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Nos. 99-5 and 99-29

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANTONIO J. MORRISON, ET AL.

CHRISTY BRZONKALA, PETITIONER

v.

ANTONIO J. MORRISON, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether 42 U.S.C. 13981, the provision of the Violence Against Women Act that creates a private right of action for victims of gender-motivated violence, is a valid exercise of Congress's power under the Commerce Clause of the Constitution.

2. Whether 42 U.S.C. 13981 is a valid exercise of Congress's power under the Enforcement Clause of the Fourteenth Amendment to the Constitution.

PARTIES TO THE PROCEEDING

Petitioner is the United States of America, which intervened in the district court to defend the constitutionality of 42 U.S.C. 13981. Christy Brzonkala was the plaintiff in the district court and an appellant in the court of appeals; she is also a petitioner in this Court.

Respondents are Antonio J. Morrison and James L. Crawford. The Virginia Polytechnic Institute and State University, Cornell D. Brown, and William E. Landsidle, in his capacity as Comptroller of the Commonwealth of Virginia, were defendants/appellees below.

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OPINIONS BELOW

The opinion of the court of appeals sitting en banc (Pet. App. 1a-281a) is reported at 169 F.3d 820. The earlier opinion of a panel of that court (Pet. App. 282a-349a) is reported at 132 F.3d 949. The opinion of the district court (Pet. App. 350a-403a) is reported at 935 F. Supp. 779.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 1999. On May 25, 1999, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 30, 1999. The petition was filed on June 25, 1999, and granted on September 28, 1999. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, provides: "The Congress shall have Power * * * To regulate Commerce * * * among the several States."

2. The Equal Protection Clause of Section 1 of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Section 5 of the Fourteenth Amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

3. The civil rights provision of the Violence Against Women Act, 42 U.S.C. 13981, is reproduced in an appendix to this brief (App., *infra*, 1a-3a).

STATEMENT

This case presents a constitutional challenge to 42 U.S.C. 13981, the provision of the Violence Against Women Act of 1994 that gives victims of gender-motivated violence a private right of action against their assailants. Section 13981 enables victims to obtain compensation for the lost earnings, medical expenses, and other pecuniary and non-pecuniary losses associated with gender-motivated violence and to obtain other appropriate relief.

Between 1990 and 1994, Congress conducted extensive hearings that revealed that gender-motivated violence is an overwhelming national problem, which substantially affects interstate commerce by impeding the travel, employment, and other economic activities of its victims and potential victims. Congress also found that pervasive bias in the state criminal and civil justice systems has exacerbated the problem and, indeed, has denied victims of gender-motivated violence the equal protection of the laws. Congress therefore concluded that the creation of a private right of action for victims of gender-motivated violence was an appropriate exercise of its authority under the Commerce Clause and the Enforcement Clause of the Fourteenth Amendment. A divided Court of Appeals for the Fourth Circuit held otherwise.

1. Congress enacted the Violence Against Women Act to address "the escalating problem of violence against women." S. Rep. No. 138, 103d Cong., 1st Sess. 37 (1993) (1993 S. Rep.). Congress chose to address that problem through "several different complementary strategies," including new federal crimes, a new federal civil remedy, and new federal grant programs. S. Rep. No. 197, 102d Cong., 1st Sess. 34 (1991) (1991 S. Rep.). The crimes created by the statute punish certain types of interstate domestic violence. See 18 U.S.C. 2261, 2262 (1994 & Supp. III 1997).[1] The grant programs authorized $1.6 billion in federal spending over six years to support state, local, and tribal efforts to reduce violence against women, including rape prevention and education programs, law-enforcement efforts, victim services programs, battered women's shelters, and improved security in public transit. See, *e.g.*, 42 U.S.C. 300w-10, 3796gg, 3796hh, 10409(a), 13931.

Congress considered one of the "[m]ost important[]" components of the Violence Against Women Act to be its civil rights provision, Section 13981, which gives victims of gender-motivated violence a federal cause of action against its perpetrators. 1993 S. Rep. 38. As Congress explained, Section 13981 "makes a national commitment to condemn crimes motivated by gender in just the same way that we have made a national commitment to condemn crimes

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[1] The criminal provisions of the Violence Against Women Act, which are not at issue here, have been uniformly sustained against constitutional challenge by the courts of appeals. See, *e.g.*, *United States* v. *Gluzman*, 154 F.3d 49 (2d Cir. 1998), cert. denied, 119 S. Ct. 1257 (1999); *United States* v. *Wright*, 128 F.3d 1274 (8th Cir. 1997), cert. denied, 523 U.S. 1053 (1998); *United States* v. *Bailey*, 112 F.3d 758 (4th Cir.), cert. denied, 522 U.S. 896 (1997).

motivated by race or religion." S. Rep. No. 545, 101st Cong., 2d Sess. 41 (1990) (1990 S. Rep.).

Section 13981(b) declares that "[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender." Section 13981(c), in turn, provides:

> A person * * * who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section [to be free from gender-motivated violence] shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.

Section 13981(d) defines a "crime of violence motivated by gender" that could give rise to such a cause of action. A "crime of violence" is defined as "an act or series of acts that would constitute a felony against the person" (or a felony against property if the conduct poses "a serious risk of physical injury" to a person) under federal or state law and that would satisfy the definition of a "crime of violence" in 18 U.S.C. 16, "whether or not those acts have actually resulted in criminal charges, prosecution, or conviction. 42 U.S.C. 13981(d)(2).[2] Such a crime is "motivated by gender" if it was committed "because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." 42 U.S.C. 13981(d)(1).

Section 13981(a) expressly invokes two sources of Congress's constitutional authority to create a federal cause

[2] A "crime of violence" is defined in 18 U.S.C. 16 as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another" or "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

of action for victims of gender-motivated violence: the Commerce Clause and Section 5 of the Fourteenth Amendment.

2. In the Conference Report adopted in connection with the Violence Against Women Act, Congress explained why its commerce power extends to the regulation of gender-motivated violence:

> [C]rimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce; crimes of violence motivated by gender have a substantial adverse effect on interstate commerce by diminishing national productivity increasing medical and other costs, and decreasing the supply of and the demand for interstate products.

H.R. Conf. Rep. No. 711, 103d Cong., 2d Sess. 385 (1994) (Conf. Rep.).

Congress reached that conclusion after four years of extensive investigation and consideration of the problem of gender-motivated violence. In a series of committee hearings between 1990 and 1994, Congress heard testimony from a variety of experts: state attorneys general, federal and state law-enforcement officials, business and labor representatives, physicians, mental-health professionals, legal scholars, and victims of gender-motivated violence. The evidence presented at those hearings demonstrated to Congress that gender-motivated violence is pervasive, has a substantial effect on interstate commerce, and often goes unremedied because of widespread bias in state justice systems.

a. Congress's extensive fact-finding revealed that violence against women is a problem of the first magnitude and

of national scope. For example, the evidence showed:

- "Violent attacks by men now tops the list of dangers to an American woman's health. Every 15 seconds, a woman is battered and, every 6 minutes, a woman is raped in the United States." 1991 S. Rep. 36.
- "Every week, during 1991, more than 2,000 women were raped and more than 90 women were murdered—9 out of 10 by men." 1993 S. Rep. 38.
- "An estimated 4 million American women are battered each year by their husbands or partners. Approximately 95% of all domestic violence victims are women." H.R. Rep. No. 395, 103d Cong., 1st Sess. 26 (1993) (1993 H. Rep.).
- "Three out of four American women will be victims of violent crimes sometime during their life." *Id.* at 25.[3]

b. The evidence amassed by Congress also demonstrated that violence against women has a substantial impact on interstate commerce. As the 1993 Senate Report explained, "[g]ender-based violence bars its most likely targets—women—from full [participation] in the national economy," by impeding their ability to work, to travel, and to engage in other economic activity. 1993 S. Rep. 54.

Congress was informed that "violent crime against women costs this country at least 3 billion * * * dollars a year." 1990 S. Rep. 33 (citing "partial estimates" of those costs). A significant portion of those costs was attributed to the impact of gender-motivated violence on victims' participation and performance in the workforce. Among victims of rape, for example, "almost 50 percent * * * lose their jobs or are forced to quit in the aftermath of the crime." 1993 S. Rep. 54. Even those who remain employed after the rape may experience a prolonged period of decreased productivity. 1990 S. Rep. 33. Domestic violence likewise "takes its toll in employee absenteeism and sick time for women who either cannot leave their homes or are afraid to show the physical effects of the violence." *Id.* at 37; see *Women and Violence: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess., Pt. I, at 58 (1990) (*1990 S. Jud. Hearings*) (noting that the costs of employee absenteeism due to domestic violence may reach $3 billion to $5 billion a year).[4]

Congress was also informed that "[e]ven the fear of gender-based violence affects the economy because it deters women from taking jobs in certain areas or at certain hours that pose a significant risk of such violence." 1993 S. Rep. 54. For example, "women often refuse higher-paying night jobs in the service/retail industries because of the fear of attack." *Id.* at 54 n.70. Unfortunately, "[t]hose fears are justified." *Ibid.* (noting that for women, but not for men, the leading cause of death on the job is homicide). For similar reasons, many women refrain from using public transportation, shopping, or going to the movies, particularly after dark. 1991 S. Rep. 38; *1990 S. Jud. Hearings* 109.

c. Congress found that the problem of gender-motivated violence was exacerbated by pervasive bias in state justice systems, including bias among police officers, prosecutors,

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[3] The congressional reports noted that the full extent of the problem is difficult to measure. 1990 S. Rep. 31-32. Estimates indicate that only 50% of rapes and fewer than 10% of sexual assaults are reported. See *Women and Violence: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess., Pt. 1, at 12 (1990); see also *Violence Against Women: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 6 (1992) (*1992 H. Jud. Hearing*).

[4] The legislative record also identified other ways in which gender-motivated violence affects interstate commerce and the national economy. The cost of medical care for victims of domestic violence, for example, was estimated at more than $100 million a year. *1990 S. Jud. Hearings* 58. And as many as 50% of the women and children who are homeless in this country are fleeing domestic violence. 1990 S. Rep. 37.

judges, juries, and court employees. The Conference Report concluded that "bias and discrimination in the [state] criminal justice system often deprive[] victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled." Conf. Rep. 385.

In reaching that conclusion, Congress relied, in part, on the reports compiled by some 20 state task forces on gender bias. The 1991 Senate Report noted that "[s]tudy after study commissioned by the highest courts of the States—from Florida to New York, California to New Jersey, Nevada to Minnesota—has concluded that crimes disproportionately affecting women are often treated less seriously than comparable crimes against men." 1991 S. Rep. 43; see also *id.* at 43 n.40; 1993 S. Rep. 45 n.29, 49 n.52 (citing 20 such studies conducted between 1984 and 1991). The Senate Report found that "[c]ollectively these reports provide overwhelming evidence that gender bias permeates the court system and that women are most often its victims." 1991 S. Rep. 43-44 (quoting Lynn H. Schafran, *Overwhelming Evidence: Reports on Gender Bias In the Courts*, Trial, Feb. 1990, at 28); see also 1993 S. Rep. 49 ("[w]omen often face barriers of law, of practice, and of prejudice not suffered by other victims of discrimination").

For example, the Illinois task force found that there was "a continuing suspicion of the credibility of sexual assault victims on the part of police, prosecutors, judges, and juries." Illinois Task Force on Gender Bias in the Courts, *Gender Bias in the Courts* 16 (1990). Accordingly, "[a]lthough rape is rarely committed before eyewitnesses and is often not reported immediately, prosecutors and investigators seek corroboration, including evidence of a 'prompt complaint.'" *Ibid.* (noting that sexual assault victims, unlike victims of other crimes, had been required by police and prosecutors to take polygraph tests). The Texas task force similarly found that "[w]omen sexual-assault victims are accorded less credibility by the judicial system than victims of other types

of assaults." Texas Gender Bias Task Force, *Final Report* 5 (1994). Women frequently confront the assumption that they invited or precipitated a sexual assault. See, *e.g.*, 1991 S. Rep. 34 (describing how a Vermont probation officer questioned whether a 9-year-old girl was a "true victim" of sexual assault because he had heard that she was a "tramp") (quoting Vermont Supreme Court & Vermont Bar Ass'n, *Report of the Vermont Task Force on Gender Bias in the Legal System* 140 (1991)). Such assumptions are particularly prevalent in cases of acquaintance rape, which police regularly decline to investigate and prosecutors regularly decline to prosecute. *Id.* at 47-48. As a result, "a rape survivor may have as little as a 5-percent chance of having her rapist convicted." 1991 S. Rep. 44.

The state task force reports similarly demonstrated to Congress that "[g]ender bias contributes to the judicial system's failure to afford the protection of the law to victims of domestic violence." 1993 S. Rep. 46. In California, for example, the state task force found that "police officers, district and city attorneys, court personnel, mediators, and judges—the justice system—treated the victims of domestic violence as though their complaints were trivial, exaggerated or somehow their own fault." *Ibid.* (quoting Administrative Office of the Judicial Council of the Courts of California, *Achieving Equal Justice for Women and Men in the Courts* 5 (1993)); see also 1991 S. Rep. 34 (quoting a California judge as stating that a domestic violence victim in his court "probably should have been hit"). In Georgia, a state judge was reported to have "mocked," "humiliated," and "ridiculed" a domestic violence victim who was later killed by her estranged husband. 1991 S. Rep. 34 (quoting Supreme Court of Georgia, *Report on Gender and Justice in the Judicial System* 235 (1991)). And in Maryland, a state judge refused to believe a woman's complaint that her husband had threatened to kill her with his gun "because I don't believe that anything like this could happen to me." *Ibid.*

(quoting Maryland Spec. Jt. Comm., *Gender Bias in the Courts* 2-3 (1989)). The record before Congress demonstrated that such deeply ingrained attitudes often cause police, prosecutors, judges, and other court personnel to treat domestic violence less severely than other sorts of violence. See, *e.g.*, 1993 S. Rep. 41 ("In cases where a comparable assault by a stranger on the street would lead to a lengthy jail [term], a similar assault by a spouse will result neither in arrest nor in prosecution.").

Congress was also informed that state civil remedies for victims of sexual assault and domestic violence often have significant flaws. The 1993 Senate Report noted, for example, that "in many States rape survivors * * * may be forced to expose their private lives and intimate conduct to win a damage award; and * * * in some cases, they may be barred from suit altogether by tort immunity doctrines or marital exemptions." 1993 S. Rep. 55. Accordingly, while sexual assault and domestic violence victims may, "[i]n theory," have certain civil remedies at their disposal, "[i]n practice, few are able to use those remedies." 1991 S. Rep. 44. Indeed, the 1991 Senate Report noted that "[l]ess than 1 percent of all victims have collected damages" against their assailants—a statistic that "belie[s] claims that State laws provide 'adequate' remedies for the victims of these crimes." *Ibid.*

Congress concluded, based on its evaluation of the extensive legislative record, that gender-motivated violence poses a national problem demanding a national response. The state attorneys general concurred: "Our experience as Attorneys General strengthens our belief that the problem of violence against women is a national one, requiring federal attention, federal leadership, and federal funds." *Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House*

Comm. on the Judiciary, 103d Cong., 1st Sess. 35 (1993) (*1993 H. Jud. Hearing*).[5]

Congress determined that the private right of action provided by Section 13981, together with the other provisions of the Violence Against Women Act, was an appropriate response to that national problem. As the 1993 Senate Report explained, Section 13981's declaration that "[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender" would make clear to all Americans—including those in the justice system—that crimes motivated by gender bias are "to be considered as serious as crimes motivated by religious, racial, or political bias." 1993 S. Rep. 38. Moreover, the private right of action in Section 13981 was particularly important because it would "allow survivors an opportunity for legal vindication that the survivor, not the State, controls." 1990 S. Rep. 42.

3. In September 1994, at the time of the events at issue in this case, petitioner Christy Brzonkala was an incoming freshman at Virginia Polytechnic Institute (Virginia Tech). Respondents Antonio Morrison and James Crawford were students at Virginia Tech and members of its football team. Pet. App. 7a-8a, 211a; J.A. 14-15.

Brzonkala alleges that 30 minutes after she met Morrison and Crawford in the dormitory where she resided, the two men pinned her down on a bed and took turns forcibly raping her. Afterwards, Morrison allegedly told Brzonkala, "You

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[5] The quoted statement is contained in a July 22, 1993, letter, signed or concurred in by 38 state attorneys general, that was submitted to the House Judiciary Committee in support of the Violence Against Women Act. *1993 H. Jud. Hearing* 34-36; see also *Violence Against Women: Victims of the System: Hearing Before the Senate Comm. on the Judiciary*, 102d Cong., 1st Sess. 37-38 (1991) (resolution unanimously adopted by National Association of Attorneys General endorsing the 1990 version of the Act). Some state officials opposed the Act. See *1993 H. Jud. Hearing* 77-84 (letter and resolution of Conference of Chief Justices opposing civil remedy provision of the Act).

better not have any f***ing diseases." Subsequently, Morrison allegedly announced publicly in the dormitory's dining hall that "I like to get girls drunk and f*** the s*** out of them." Pet. App. 8a, 211a; J.A. 15-18.

Brzonkala alleges that she became depressed and withdrawn after the assault. She ceased attending classes, attempted suicide, and required psychiatric treatment. She ultimately withdrew from school. Pet. App. 212a-213a; J.A. 17-18.

4. In December 1995, Brzonkala brought this action against Morrison and Crawford, invoking Section 13981. Morrison and Crawford moved to dismiss, arguing that Congress lacked constitutional authority to enact Section 13981 and that Brzonkala failed to state a claim under that statute. The United States intervened to defend the constitutionality of Section 13981. Pet. App. 8a-9a.

The district court granted the motion to dismiss. The court held that Brzonkala had stated a claim under Section 13981 at least against Morrison, and that the constitutional question was therefore presented for decision. Pet. App. 361a-362a. The court then concluded that Congress lacked the constitutional authority to enact Section 13981.

The court held that Section 13981 was not a proper exercise of Congress's power under the Commerce Clause. Pet. App. 369a-382a. The court perceived the statute as not meaningfully distinguishable from the statute struck down in *United States* v. *Lopez*, 514 U.S. 549 (1995), notwithstanding that here, unlike in *Lopez*, Congress made specific findings regarding the connection between the regulated conduct and interstate commerce. Pet. App. 371a.

The court also held that Section 13981 was not a proper exercise of Congress's power to enforce the Fourteenth Amendment. The court recognized that "[s]ome possibility exists that at least part of the states' differential treatment of gender-based violent crimes against women is due to gender discrimination, and so correcting the differential

treatment arising out of gender discrimination is a legitimate Fourteenth Amendment concern." Pet. App. 399a. But the court concluded that "no reasonable possibility exists that [Section 13981] will help remedy this legitimate Fourteenth Amendment concern," because the statute "is tailored to remedy conduct other than the conduct giving rise to the equal protection concern." *Id.* at 399a-400a.

5. A divided panel of the Fourth Circuit reversed. Pet. App. 282a-349a. The court held that Section 13981 was a valid exercise of Congress's power under the Commerce Clause, *id.* at 310a-340a, and thus did not reach the Fourteenth Amendment question. Judge Luttig dissented. *Id.* at 340a-349a.

6. On rehearing en banc, a divided court of appeals affirmed the judgment of the district court, holding that Congress did not have the power to enact Section 13981 under either the Commerce Clause or Section 5 of the Fourteenth Amendment. Pet. App. 1a-281a.

a. Addressing the Commerce Clause question, the court of appeals acknowledged that "[t]he legislative record in this case, considered as a whole, shows that violence against women is a sobering problem and also that such violence ultimately does take a toll on the national economy." Pet. App. 68a. The court likewise recognized that "Congress' specific findings regarding the relationship between gender-motivated violence and interstate commerce * * * depict the manner in which such violence affects interstate commerce." *Ibid.*

The court nonetheless concluded that Section 13981 could not be sustained under Congress's power to regulate activities substantially affecting interstate commerce. The court understood *Lopez* to hold that Congress cannot regulate an activity that substantially affects interstate commerce unless (1) the regulated activity is itself an economic one or (2) the statute includes a jurisdictional element requiring a case-by-case inquiry into the nexus to interstate commerce.

Pet. App. 15a-31a. Because Section 13981 "neither regulates an economic activity nor includes a jurisdictional element," the court concluded that "it cannot be upheld on the authority of *Lopez* or any other Supreme Court holding demarcating the outer limits of Congress' power under the substantially affects test." *Id.* at 31a.

Alternatively, the court held that Section 13981 could not be sustained under the commerce power "[e]ven if these two categories of permissible congressional regulations demarcate not the absolute, but only the presumptive outer limits of congressional power under the substantially affects test." Pet. App. 31a. Noting the *Lopez* Court's admonition that the commerce power cannot be construed in a manner that would "effectually obliterate the distinction between what is national and what is local and create a completely centralized government," *id.* at 33a (quoting *Lopez*, 514 U.S. at 557), the court concluded that Section 13981 presents the same federalism concerns as did the statute in *Lopez*. *Id.* at 31a-51a. In the court's view, Section 13981 could not be upheld without endorsing an unlimited view of the commerce power that would permit Congress to "assume control over the entire field of violent crime, or, for that matter, all crime within all of the States." *Id.* at 89a.

b. The court of appeals also held that Section 13981 could not be sustained as legislation enforcing the Fourteenth Amendment, *i.e.*, legislation remedying bias in state civil and criminal justice systems against victims of gender-motivated violence. The court reasoned that Section 13981 "is invalid, regardless of whether its end is to remedy unconstitutional state action, for the simple reason that it regulates purely private conduct and is not limited to individual cases in which the state has violated the plaintiff's Fourteenth Amendment rights." Pet. App. 125a-126a. The court stated that its conclusion was compelled by *United States* v. *Harris*, 106 U.S. 629 (1883), and the *Civil Rights Cases*, 109 U.S. 3 (1883). Pet. App. 104a-126a.

The court also held that Section 13981 did not satisfy the requirement articulated in *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997), of "congruence and proportionality between the [constitutional] injury to be prevented or remedied and the means adopted to that end." First, the court expressed doubt that the legislative record revealed constitutional violations to be remedied. Pet. App. 153a-160a. Although the court acknowledged that the record "does establish that the States enforce and apply certain laws in a manner that may ultimately prevent the victims of gender-motivated violence from obtaining vindication through the criminal or civil systems," the court questioned whether such conduct amounted to "*purposeful* discrimination against women in the enforcement of facially neutral laws that could give rise to an equal protection violation." *Id.* at 153a. Second, the court concluded that Section 13981 was so out of proportion to the constitutional violations that it sought to remedy that it could not be regarded as an effort to enforce the Fourteenth Amendment. *Id.* at 160a-163a.[6]

c. Judge Motz, writing for the four dissenting judges, concluded that Section 13981 was a valid exercise of Cogress's power under the Commerce Clause. Pet. App. 224a-281a. The dissent concluded that Congress had the requisite rational basis, as reflected in the "detailed and extensive" legislative findings and testimony, *id.* at 229a, to determine that "gender-based violence substantially affects interstate

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[6] Chief Judge Wilkinson and Judge Niemeyer, both of whom joined the majority opinion, also wrote separate concurrences. See Pet. App. 168a-189a (Wilkinson, C.J., concurring) (concluding that striking down Section 13981 as exceeding Congress's constitutional authority is not improper judicial activism); *id.* at 189a-209a (Niemeyer, J., concurring) (proposing that in order for a regulation of intrastate activity to be sustained as substantially affecting interstate commerce, "(1) the target of [the regulation] must be interstate commerce, even though it may not be the purpose of the regulation, and (2) the effect that the activity has on interstate commerce must be proximate and not incidental").

commerce," *id.* at 237a. The dissent found no support in *Lopez* for limiting Congress's commerce power to statutes that regulate economic activities or contain a jurisdictional element. *Id.* at 240a-247a.

The dissent also rejected the majority's conclusion that federalism concerns undermined Section 13981, noting that Congress had "explicitly found that the states refused or were unable to deal effectively with the problems created by gender-based violence." Pet. App. 232a. Thus, the dissent explained, Section 13981 "provides a necessary national remedy for a severe problem that the states have, by their own admission, been unable to address effectively." *Id.* at 278a. The dissent therefore concluded that Section 13981, in contrast to the statute in *Lopez*, did not "add[] a redundant layer of federal regulation in an area where most states had already acted," but instead "responded to the states' self-described needs." *Id.* at 276a.

SUMMARY OF ARGUMENT

After four years of investigation, Congress determined that violence against women is pervasive in modern American society to a degree that had previously been unrecognized. Congress found that the problem has been exacerbated by the States' failure to treat violent crimes that primarily victimize women, such as rape and domestic abuse, as seriously as other violent crimes. In addition, Congress found that the problem not only devastates the lives of its victims, but also harms the national economy and interstate commerce in many ways. Based on those findings, Congress exercised its powers under the Commerce Clause and the Enforcement Clause of the Fourteenth Amendment to enact Section 13981, a private right of action that enables victims of gender-motivated violence to seek redress against their assailants. Congress acted well within its constitutional authority in doing so.

1. Section 13981 is an appropriate exercise of Congress's power under the Commerce Clause. Congress had far more than the rational basis that this Court has required to conclude that gender-motivated violence substantially affects interstate commerce. Congress found that gender-motivated violence burdens the national economy and interstate commerce in several distinct ways: by deterring women from seeking jobs, including jobs in interstate businesses, that would require them to work at certain hours or in certain places; by inhibiting women from traveling, interstate as well as intrastate, and from engaging in other economic activity; by impeding victims' ability to work at all, or to work productively, thereby forcing many into dependence, poverty, and even homelessness; and by imposing increased medical and other costs on victims, their employers and insurers, and state and local governments. All of those burdens were documented in the extensive legislative record. Congress reviewed that record with the understanding that the Commerce Clause had long been regarded as an appropriate source of constitutional authority to regulate activity that creates a barrier to the participation of particular groups in the Nation's commerce. See, *e.g.*, *Katzenbach* v. *McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241 (1964).

Contrary to the court of appeals' reasoning, Congress's commerce power is not confined to the regulation of those intrastate activities that are "commercial" or "economic" in nature. It is not the character of the activity, but the substantiality of its impact on interstate commerce, that determines whether the activity may be regulated under the Commerce Clause. As Justices Kennedy and O'Connor suggested in their concurring opinion in *United States* v. *Lopez*, 514 U.S. 549, 580 (1995), when Congress exercises its commerce power where "neither the [regulated] actors nor their conduct has a commercial character," the regulation might be sustained if it does not "intrude upon an area of tradi-

tional state concern." Nor is Section 13981 unconnected to economic activity. The gender-motivated violence remedied by Section 13981 occurs at, or en route to, workplaces, retail establishments, and interstate transportation terminals as well as in other settings; in addition, Section 13981 is directed not only at gender-motivated violence itself, but also at the inadequate state mechanisms for compensating victims for its economic consequences.

Section 13981 does not, as the court of appeals suggested, present the federalism concerns that were presented by the statute at issue in *Lopez*. First, Section 13981 is an exclusively civil remedy that enables victims of gender-motivated violence to seek redress against their assailants—a remedy that supplements, but does not supplant, any remedy that the victims may have under state law. It does not intrude into the operations of state government, operate against the States, or conscript the States or state officials in its enforcement. Second, Section 13981 was intended as, and patterned after, federal civil rights legislation. The vindication of civil rights has long been recognized to be a paradigmatic national responsibility, not one that has been primarily left to the States. Third, Congress enacted Section 13981 to address a problem that, as the States acknowledged, their own justice systems had failed adequately to address. A statute premised on such systemic state failures does not presage an open-ended expansion of federal power into domains properly reserved to the States. Finally, the Violence Against Women Act, of which Section 13981 is a part, is a prototypical example of cooperative federalism. It contains a number of provisions designed to encourage and enhance the States' own efforts to address gender-motivated violence. Section 13981, especially when viewed in the context of the entire Act, poses no threat to federalism principles.

2. Section 13981 is also an appropriate exercise of Congress's power under Section 5 of the Fourteenth Amendment to remedy and deter violations of the Equal Protection

Clause. Congress, employing its unique institutional ability to investigate and assess whether legislation is needed to enforce constitutional guarantees, found that pervasive bias in the state justice systems denies victims of gender-motivated violence the equal protection of the laws. Congress based that determination on an extensive record documenting that inaccurate stereotypes about gender-motivated violence and its victims—reflected in state laws, state evidentiary rules, and, especially, the attitudes of police, prosecutors, judges and other state actors—have caused violent crimes motivated by gender animus to be treated less seriously than other violent crimes. It is well-settled that state action based on inaccurate stereotypes, including stereotypes relating to gender, may violate the Equal Protection Clause. Congress was entitled to invoke its authority under Section 5 to remedy such violations.

Section 13981 is a suitable remedy for the constitutional violations that Congress identified. As Congress explained, Section 13981 gives victims of gender-motivated violence "an opportunity for legal vindication," in either federal or state court, "that the [victim], not the State, controls." 1990 S. Rep. 42. Section 13981 thus remedies and prevents the discrimination that victims of gender-motivated crimes often face in the state justice systems by giving them an alternative means of obtaining legal redress. Congress's broad enforcement authority under Section 5 is not limited, as the court of appeals believed, to the creation of remedies against the States themselves. A remedy that permits victims of gender-motivated violence to seek the vindication withheld by the States is a wholly permissible means of effectuating the purposes of the Fourteenth Amendment.

Section 13981 is fully consistent with this Court's decisions addressing the scope of Congress's power to enforce the Fourteenth Amendment. Section 13981 is unlike the statutes in this Court's Reconstruction-era decisions, which were predicated on the assumption that private conduct may

violate the Equal Protection Clause. Those decisions do not bar Congress from reaching the conduct of private persons, when Congress does so to remedy discrimination by the State or its agents. Nor does Section 13981 suffer from the defects that the Court perceived in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). Section 13981, unlike the statute in that case, provides a remedy that is congruent and proportional to the constitutional violations that Congress identified. Section 13981 does not redefine the substantive prohibitions of the Fourteenth Amendment. To the contrary, Section 13981 provides an additional remedy for state action that Congress reasonably found would violate equal protection under the standards announced by this Court. And, in contrast to the situation in *Flores*, Section 13981 is an appropriately limited remedy that does not intrude into the operations of state government.

ARGUMENT

I. SECTION 13981 IS A VALID EXERCISE OF CONGRESS'S POWER UNDER THE COMMERCE CLAUSE

Congress rationally determined that gender-motivated violence imposes a substantial burden on interstate commerce, impeding its victims' efforts to work, travel, and engage in other economic activity. Section 13981 is specifically designed to address the economic consequences of gender-motivated violence by providing victims a means of recovering their lost earnings, medical expenses, and other pecuniary and non-pecuniary losses. Section 13981, as a private civil remedy, does not interfere with the activities of the States. Indeed, Section 13981 was adopted in response to Congress's determination, concurred in by a substantial majority of state attorneys general, that the problem of gender-motivated violence required a comprehensive national

solution. Section 13981 is thus a proper exercise of Congress's power under the Commerce Clause.

A. Congress Rationally Found That Gender-Motivated Violence Imposes A Substantial Burden On Interstate Commerce

1. This Court has repeatedly recognized that Congress's commerce power, while not unlimited, is nonetheless "broad and sweeping." *Katzenbach* v. *McClung*, 379 U.S. 294, 305 (1964); accord, *e.g.*, *Wickard* v. *Filburn*, 317 U.S. 111, 127-128 (1942); *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824); cf. *United States* v. *Lopez*, 514 U.S. 549, 568 (1995) (Kennedy, J., concurring) ("the Commerce Clause grants Congress extensive power and ample discretion to determine its appropriate exercise"). "The fundamental principle is that the power to regulate commerce is the power to enact all appropriate legislation for its protection and advancement; to adopt measures to promote its growth and insure its safety; to foster, protect, control and restrain." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-37 (1937) (internal quotation marks and citations omitted).

It is thus well-settled that Congress's power over interstate commerce "is not confined to the regulation of commerce among the States." *United States* v. *Darby*, 312 U.S. 100, 118 (1942). Congress also may regulate "those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." *Ibid.*; accord, *e.g.*, *Perez* v. *United States*, 402 U.S. 146, 154 (1971); *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 258 (1964); *Wickard*, 317 U.S. at 125.[7]

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[7] The power to regulate intrastate activity that has a substantial effect on interstate commerce is confirmed by Congress's constitutional authority "[t]o make all Laws which shall be necessary and proper for

The modern Court has consistently applied "the traditional rationality standard of review" to assess whether a statute is a permissible exercise of Congress's commerce power, "defer[ring] to a congressional finding that a regulated activity affects interstate commerce 'if there is any rational basis for such a finding.'" *Preseault* v. *ICC*, 494 U.S. 1, 17 (1990) (quoting *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981)). The Court has thus explained that, "where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end." *McClung*, 379 U.S. at 303-304; see also *Polish Alliance* v. *NLRB*, 322 U.S. 643, 650 (1944) (Frankfurter, J.) (whether activity sufficiently affects interstate commerce requires "a practical judgment," the exercise of which "the Constitution entrusts primarily and very largely to the Congress, subject to the latter's control by the electorate"). While the Court in *Lopez* identified a zone of "truly local" activity that is not subject to regulation under the Commerce Clause, the Court adhered to the principle that Congress's judgments in this area are entitled to deference. See *Lopez*, 514 U.S. at 557 (citing cases); see also *id.* at 568 (Kennedy, J., concurring) (counseling "great restraint before the Court determines that the [Commerce] Clause is insufficient to support an exercise of the national power").

2. Congress expressly invoked the Commerce Clause as a source of its constitutional authority to enact Section 13981, stating that the private right of action was designed, among other things, "to promote * * * activities affecting

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carrying into Execution" its enumerated powers. Art. I, § 8, Cl. 18. See *New York* v. *United States*, 505 U.S. 144, 158-159 (1992) ("The Court's broad construction of Congress' power under the Commerce * * * Clause[] has, of course, been guided * * * by the Constitution's Necessary and Proper Clause.").

interstate commerce." 42 U.S.C. 13981(a). The Conference Report on Section 13981 sets forth Congress's findings that "crimes of violence motivated by gender have a substantial adverse effect on interstate commerce" in several specific respects. Conf. Rep. 385. Congress arrived at that conclusion after four years of study, as reflected in the extensive hearings and committee reports, which documented the economic impact of gender-motivated violence. Congress reviewed that record with the understanding that the Commerce Clause had long been regarded as an appropriate source of constitutional authority to regulate forms of discrimination that impede the participation of particular groups in the national economy. See, *e.g.*, 1993 S. Rep. 54-55 & n.71 (concluding that "[t]here is no doubt that the Congress has the power to create [Section 13981] under the Constitution's Commerce Clause" based on "precisely the rationale on which the Supreme Court relied in upholding the 1964 Civil Rights Act" in *Heart of Atlanta Motel* and *McClung*).

The Conference Report, the committee reports, and the hearing records demonstrate that Congress had far more than a rational basis to find that gender-motivated violence imposes a substantial burden on interstate commerce by impeding the participation of its victims, primarily women, in the national economy. We focus here on five aspects of that burden.

First, Congress found that gender-motivated violence "diminish[es] national productivity." Conf. Rep. 385. Victims of gender-motivated violence are often unable to work, or to work productively, as a result of their physical injuries and emotional distress. See *Violence Against Women—Victims of the System: Hearing Before the Senate Comm. on the Judiciary*, 102d Cong., 1st Sess. 241 (1991) (*1991 S. Jud. Hearing*) (president of the National Federation of Business and Professional Women notes that victims of domestic violence "either forego employment opportunities available or jeopardize their current employment by absenteeism and

poor work performance"). Congress was informed that the cost of employee absenteeism due to domestic violence alone has been estimated at between $3 billion and $5 billion annually. *1990 S. Jud. Hearings* 58. A significant portion of those costs are borne by employers engaged in interstate commerce.[8]

The record before Congress also demonstrated that rape, like domestic violence, exacts a significant toll in the workplace. For example, "almost 50 percent of rape victims lose their jobs or are forced to quit because of the crime's severity." 1991 S. Rep. 53. Even those who remain employed after a rape or other crime of violence may experience a prolonged period of decreased productivity. 1990 S. Rep. 33.

Second, Congress found that gender-motivated violence deters potential victims "from engaging in employment in interstate business." Conf. Rep. 385. Congress was informed that women refrain from "taking jobs in certain areas or at certain hours that pose a significant risk of such violence." 1993 S. Rep. 54. For example, "women often refuse higher-paying night jobs in the service/retail industries because of the fear of attack." *Id.* at 54 n.70. Such fears are well-founded. *Ibid.* (noting that homicide is the leading cause of job-related death among women but not among men).[9]

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[8] The testimony specifically noted the impact of domestic violence on the productivity of two major corporations engaged in interstate commerce: Polaroid Corporation and E.I. DuPont de Nemours & Company. See *Hearing on Domestic Violence: Hearing Before the Senate Comm. on the Judiciary*, 103d Cong., 1st Sess. 16 (1993) (*1993 S. Jud. Hearing*) (noting Polaroid employees' "tardiness, poor job performance, increased medical claims [and] interpersonal conflicts in the workplace" as a result of domestic violence); *1990 S. Jud. Hearings* 58 (noting DuPont's need to develop programs to deal with the domestic violence that affected many of its employees).

[9] See also, *e.g.*, *1991 S. Jud. Hearing* 86 (testimony of Professor Burt Neuborne) (Women "tend to choose their jobs with one eye looking over

Third, Congress found that gender-motivated violence "deter[s] potential victims from traveling interstate." Conf. Rep. 385. For example, women are reluctant to use public transportation, particularly after dark, because of the fear of attack. 1991 S. Rep. 38 (noting that nearly 50% of the women questioned in one survey stated that they did not use public transportation alone after dark).[10] The use of public transportation, even for relatively short distances, may entail travel across state lines.[11]

Fourth, Congress found that gender-motivated violence deters victims and potential victims from "transacting with business, and in places involved, in interstate commerce," and thereby "decreas[es] the supply of and the demand for interstate products." Conf. Rep. 385; see also 1993 S. Rep. 54 ("[g]ender-based crimes and the fear of gender-based crimes * * * restrict[] consumer spending"). The record before Congress indicated that "as many as 50 percent of homeless women and children are fleeing domestic violence." 1990 S. Rep. 37. A woman in such reduced circumstances is unable to purchase the products, including those that have moved in

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their shoulder about their safety. They can't work late like men can work; they can't work overtime; they can't take jobs in localities that are considered to be dangerous.").

[10] See also, *e.g.*, *1990 S. Jud. Hearings*, Pt. 2, at 80 (letter from International Union, United Automobile Workers of America) ("The threat of violence has made many women understandably afraid to walk our streets or use public transportation.").

[11] See, *e.g.*, *Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 33 (1994) (noting the "commuter railroad connecting New York City to Northern New Jersey"); *Washington Metro. Area Transit Auth.* v. *Johnson*, 467 U.S. 925, 927 (1984) (noting the "rapid transit system (Metro) for the District of Columbia and the surrounding metropolitan region" of Maryland and Virginia).

interstate commerce, that she would otherwise purchase for herself and her children.[12]

Women also modify their spending behavior in order to avoid gender-motivated violence. For example, of the women who participated in one survey that was before Congress, three-quarters reported that they never go out alone at night to see a movie because they fear rape and other violent crimes. 1991 S. Rep. 38.[13] See also *1990 S. Jud. Hearings* 109 (observing that women in certain neighborhoods "can't walk down to the convenience store" at certain hours because of the threat of violence).

Finally, Congress found that gender-motivated violence affects interstate commerce by "increasing medical and other costs." Conf. Rep. 385. The record before Congress contained estimates that "1 million wom[e]n a year seek medical attention for injuries caused by violence at the hands of a male partner." 1993 S. Rep. 41; see also 1990 S. Rep. 37 (noting that "[a]s many as 20 percent of hospital emergency room cases are related to wife battering"). The costs of that medical care have been placed at more than $100 million a year—costs that are borne by the women themselves, by

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[12] Some victims of domestic violence are reduced to property crimes in order to pay for necessities. See *Domestic Violence: Terrorism in the Home: Hearing Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Senate Comm. on Labor and Human Resources*, 101st Cong., 2d Sess. 30 (1990) (noting that a substantial portion of the women inmates in the Massachusetts prison system are domestic violence victims who were prosecuted for writing bad checks to pay for shelter, groceries, and children's clothing); cf. *Perez*, 402 U.S. at 156 (noting that Congress's determination that extortionate credit transactions affect interstate commerce was based, in part, on evidence that "the loan shark racket * * * coerces its victims into the commission of crimes against property").

[13] Cf. *United States* v. *Shubert*, 348 U.S. 222, 226 (1955) (recognizing that the production, distribution, and exhibition of motion pictures are activities that involve interstate commerce for purposes of the Sherman Act) (citing cases).

employers and insurers, and by state and local governments. *1990 S. Jud. Hearings* 58.[14]

3. The burden that Congress found to be imposed on interstate commerce by gender-motivated violence is analogous, in three significant respects, to the burden that Congress found to be imposed on interstate commerce by racial discrimination in places of public accommodation. This Court held in *McClung* and *Heart of Atlanta Motel* that such a burden is sufficient to justify congressional action under the Commerce Clause.[15]

The Court reasoned that Congress could rationally have found that racial discrimination by restaurants, as in *McClung*, and by hotels and motels, as in *Heart of Atlanta Motel*, "obstructs interstate commerce" by "discouraging travel on the part of a substantial portion of the Negro community." *McClung*, 379 U.S. at 300; *Heart of Atlanta Motel*, 379 U.S. at 253. Similarly, here, Congress rationally found that gender-motivated violence deters many women from traveling interstate. Conf. Rep. 385.

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[14] Cf. *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. 322, 329 (1991) (recognizing that a conspiracy that affects a hospital's "purchases of out-of-state medicines and supplies as well as its revenues from out of state insurance companies would establish the necessary interstate nexus" for purposes of the Sherman Act) (internal quotation marks and citations omitted).

[15] Although the provisions of the Civil Rights Act of 1964 at issue in *Heart of Atlanta Motel* and *McClung* contain a jurisdictional element (*e.g.*, a restaurant is subject to the statute only if it "serves or offers to serve interstate travelers or a substantial portion of the food which it serves * * * has moved in commerce," 42 U.S.C. 2000a(c)), the existence of those elements was not central to the Court's analysis in either case. The Court instead focused on whether the underlying regulated activity, the denial of service on account of race, sufficiently affected interstate commerce. See, *e.g.*, *McClung*, 379 U.S. at 304-305 (observing that "[t]he absence of direct evidence connecting discriminatory restaurant service with the flow of interstate food * * * is not, given the evidence as to the effect of such practices on other aspects of commerce, a crucial matter").

In addition, the Court reasoned in *McClung* that Congress could rationally have found that racial discrimination caused blacks to spend less money at restaurants, which, in turn, caused the restaurants to sell less food and, consequently, to buy fewer goods from their out-of-state suppliers. 379 U.S. at 299-300. Similarly, here, Congress rationally found that gender-motivated violence results in reduced spending by women on a variety of consumer products that have moved, or the components of which have moved, in interstate commerce. Conf. Rep. 385.

The Court finally reasoned in *McClung* that Congress could rationally have found that racial discrimination in places of public accommodation burdened interstate commerce in yet another way: It "deterred professional, as well as skilled, people from moving into areas where such practices occurred and thereby caused industry to be reluctant to establish there," 379 U.S. at 300, presumably out of concern about its ability to attract employees and customers. Similarly, here, Congress rationally found that gender-motivated violence deters women from "taking jobs in certain areas or at certain hours" as well as from patronizing businesses in certain areas or at certain hours. 1993 S. Rep. 54. And that could, as in *McClung*, affect businesses' decisions concerning such matters as interstate relocation and expansion.

In sum, for many of same reasons this Court articulated in *McClung* and *Heart of Atlanta Motel*, Congress "had a rational basis for finding that [gender-motivated violence] had a direct and adverse effect on the free flow of interstate commerce." *McClung*, 379 U.S. at 304. Section 13981, as a statute directed at "the resolution of what the Congress found to be a national commercial problem of the first magnitude," *id.* at 305, is thus an appropriate exercise of the commerce power.

4. This Court's conclusion in *Lopez* that the Gun-Free School Zones Act of 1990 (GFSZA), Pub. L. No. 101-647, Title XVII, § 1702, 104 Stat. 4844, did not possess the requisite nexus to interstate commerce does not suggest the same conclusion with respect to Section 13981. Whereas the connection between gun possession near schools and interstate commerce in *Lopez* was both attenuated in fact and unarticulated by Congress, see 514 U.S. at 562,[16] the connection between gender-motivated violence and interstate commerce is both direct and expressly established in Congress's findings and the supporting legislative record.

As the Court explained in *Lopez*, such congressional findings are particularly significant where, as here, the connection between the regulated activity and interstate commerce may not be "visible to the naked eye." 514 U.S. at 563. Indeed, the problem of gender-motivated violence, as well as its impact on the national economy, has long been overlooked. See 1991 S. Rep. 38 (noting the "faulty statistical measures" of, and the public blindness to, violent crimes against women). Women have often been shamed into silence about rape, domestic abuse, and other violent crimes —and the impact of such crimes upon their lives—because of the attitudes of society generally and of the police, prosecutors, and court personnel assigned to deal with such crimes. See, *e.g.*, 1990 S. Rep. 33-34. Congress's findings with respect to Section 13981 reveal both the extent of the underlying problem and its substantial effect on interstate commerce.

Unlike in *Lopez*, then, the Court need not "pile inference on inference," 514 U.S. at 567, in order to sustain Section 13981. To the contrary, in order to invalidate Section 13981,

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[16] After the Fifth Circuit invalidated the GFSZA for want of findings, Congress amended the statute to add findings about the effect on commerce of gun possession near schools. See 514 U.S. at 563 n.4. Those findings were not based upon a legislative record, however; the government did not rely upon the findings in defending the statute, and this Court did not address or even describe the findings. *Ibid.*; see *id.* at 612 n.2 (Souter, J., dissenting) (dismissing "these particular afterthoughts" as "conclusory").

the Court would have to set aside Congress's express findings of a direct nexus between gender-motivated violence and interstate commerce.

B. Congress May Regulate Activities That Have A Substantial Effect On Interstate Commerce, Whether Or Not Those Activities Are "Commercial" In Nature

The court of appeals concluded that, even if gender-motivated violence substantially affects interstate commerce, Section 13981 cannot be sustained under the Commerce Clause, for either of two alternative reasons. Neither one is correct. First, the court read *Lopez* to permit Congress to regulate intrastate activities that substantially affect commerce only if a further condition is satisfied: either the activities themselves must be commercial in nature or the statute must contain a jurisdictional element that requires proof of a nexus to interstate commerce in each case. The court concluded that Section 13981 satisfied neither requirement. Pet. App. 15a-31a.[17] The court's reasoning reflects a fundamental misunderstanding of the commerce power and *Lopez*.

In *Lopez*, this Court observed that the GFSZA neither regulated a commercial activity nor contained a jurisdictional element. *Lopez*, 514 U.S. at 551, 561-562. The Court did not treat those features as dispositive, however. To the contrary, the Court reaffirmed that "[e]ven if [an] activity be local and *though it may not be regarded as commerce*, it may still, whatever its nature, be reached by Congress if it exerts a substantial effect on interstate commerce." *Id.* at 556 (quoting *Wickard*, 317 U.S. at 125) (emphasis added); see also *id.* at 559 ("the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce"). The Court then proceeded to evaluate, at

[17] The court of appeals' second rationale was that Section 13981 undermined federalism principles in the same manner as did the GFSZA in *Lopez*. That aspect of the court's decision is discussed in Part C below.

some length, whether the regulated activity in that case had the requisite effect on interstate commerce. See *id.* at 562-568.

Nor did Justice Kennedy's concurrence, which was joined by Justice O'Connor, propose to restrict Congress's commerce power to the regulation of commercial activity. Instead, the concurrence explicitly presumed that Congress may, in some circumstances, regulate non-commercial activity. The concurrence urged only that if "neither the [regulated] actors nor their conduct has a commercial character, and neither the purposes nor the design of the statute have an evident commercial nexus," then a court should "inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern." 514 U.S. at 580.

Lopez thus did not upset the Court's understanding that "[i]t is the effect upon interstate commerce or upon the exercise of the power to regulate it, *not the source of the injury* which is the criterion of Congressional power" under the Commerce Clause. *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 121 (1942) (emphasis added); accord *Jones & Laughlin Steel*, 301 U.S. at 32. Indeed, the *Lopez* Court cited, without any suggestion of disapproval, earlier decisions sustaining Congress's power under the Commerce Clause to regulate activity because of its effect on commerce, without considering whether the activity itself was fairly characterized as commercial. See *Lopez*, 514 U.S. at 557, 559-560 (citing *Wickard*, *McClung*, and *Heart of Atlanta Motel*). In *Wickard*, for example, the underlying activity was an individual farmer's cultivation of wheat for his family's personal consumption; in *Heart of Atlanta Motel* and *McClung*, the underlying activity was individual business owners' refusal to serve potential customers on the basis of their race. The Court's analysis in those cases did not address whether the underlying activity was sufficiently commercial to justify regulation under the Commerce Clause. It instead focused on whether the underlying activity, whether

commercial or not, could be found to have the requisite effect on interstate commerce. See *Heart of Atlanta Motel*, 279 U.S. at 257 (recognizing that the correct inquiry is whether the underlying activity, even if "a moral problem," has a "disruptive effect * * * on commercial intercourse").

In any event, the underlying activity at which Section 13981 is directed has an economic component. Section 13981 is designed to remedy gender-motivated violence that occurs at, or en route to, workplaces, retail establishments, and interstate transportation terminals as well as in other settings. See, *e.g.*, 1993 S. Rep. 54 n.70 (noting the risk of violence to women employed in night jobs). And Section 13981 is designed to remedy not only gender-motivated violence itself but also the inadequate existing mechanisms to compensate the victims of such violence for their economic injuries, such as lost earnings, medical expenses, and relocation costs. See, *e.g.*, 1991 S. Rep. 44 (concluding that the fact that "less than 1 percent of all victims have collected damages" against their assailants "belie[s] claims that State laws provide 'adequate' remedies for the victims of these crimes"). Accordingly, even if Congress were limited after *Lopez* to regulating intrastate activity that has some economic component, Section 13981 would come within that limitation.

C. Section 13981 Does Not Present The Federalism Concerns That Were Central To The *Lopez* Decision

The court of appeals' second rationale for concluding that Section 13981 was not a valid exercise of Congress's authority under the Commerce Clause rested on federalism concerns. The court reasoned that Section 13981, like the GFSZA in *Lopez*, could not be sustained without endorsing an unlimited expansion of the commerce power. See Pet. App. 31a-51a. The court failed to recognize critical differences between the two statutes that render Section 13981 an

appropriate, and appropriately limited, exercise of congressional authority within our federal system.

The GFSZA, as the Court emphasized in *Lopez*, was a criminal statute. 514 U.S. at 561. It thus intruded into an area in which "the States possess primary authority"—"defining and enforcing the criminal law." *Id.* at 561 n.3; see also *id.* at 564 (noting that the "states historically have been sovereign" in the areas of "criminal law enforcement" and education). The Court explained that the statute consequently had two deleterious effects on the federal-state balance. In the many States that had already prohibited the possession of guns in or near schools, the GFSZA "effect[ed] a change in the sensitive relation between federal and state criminal jurisdiction," because a crime that was previously prosecuted by the State now would be prosecuted by the United States. *Id.* at 561 n.3 (internal quotation marks omitted). And, in the remaining States that had not chosen to prohibit such conduct, the GFSZA "displace[d] state policy choices," as the United States acknowledged. *Ibid.*; see also *id.* at 583 (Kennedy, J., concurring) (observing that the GFSZA "foreclose[d] the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise").

Section 13981 presents none of the federalism concerns that animated the *Lopez* decision for several reasons:

First, Section 13981, in contrast to the GFSZA, was carefully crafted to avoid intrusions upon areas of traditional state concern. Section 13981 is an exclusively civil remedy that enables victims of gender-motivated violence to seek redress against their assailants—a remedy that supplements, but does not supplant, any remedy that the victims may have under state law. Section 13981 displaces no state law and prohibits no state action. See 42 U.S.C. 13981(d)(2) (incorporating existing federal and state legal standards in defining the conduct that may give rise to liability). Section 13981 does not operate against the States or state officials

and does not conscript the States or state officials in its enforcement.[18]

Section 13981 therefore does not implicate "the sensitive relation between federal and state criminal jurisdiction." *Lopez*, 514 U.S. at 561 n.3. Nor does Section 13981 "foreclose[] the States from experimenting and exercising their own judgment" in responding to the problem of gender-motivated violence. *Id.* at 583 (Kennedy, J., concurring). Accordingly, as 36 state attorneys general observe in their brief amici curiae, Section 13981 "complements state and local efforts to combat violence against women," without "compromising those efforts" or "intruding in an area of traditional state concern." Br. of Arizona et al. 21.

Second, Congress understood Section 13981 to be "civil rights" legislation in the classic sense. 42 U.S.C. 13981(a); see 1990 S. Rep. 41 (Section 13981 "makes a national commitment to condemn crimes motivated by gender in just the same way we have made a national commitment to condemn crimes motivated by race and religion."). To that end, Congress limited the reach of Section 13981 to violence "due, at least in part, to an animus based on the victim's gender," 42 U.S.C. 13981(d)(1), and excluded "random acts of violence unrelated to gender," 42 U.S.C. 13981(e)(1). By targeting gender-motivated violence—which Congress recognized to be "a form of discrimination," not merely "an individual crime or a personal injury," 1993 S. Rep. 51—Congress acted to vindicate civil rights. Cf. *Meritor Sav. Bank* v. *Vinson*, 477 U.S. 57, 64-67 (1986) (holding that severe or pervasive sexual harassment may constitute discrimination in violation of Title VII).

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[18] Section 13981 also precludes supplemental federal jurisdiction over state-law disputes concerning divorce, alimony, equitable distribution of property, and child custody. 42 U.S.C. 13981(e)(4). Nor may an action be removed from state court to federal court based on a claim under Section 13981. 28 U.S.C. 1445(d).

The vindication of civil rights has long been a paradigmatic federal responsibility. See *Heart of Atlanta Motel*, 379 U.S. at 245 (tracing federal civil rights legislation since 1866); see generally *Mitchum* v. *Foster*, 407 U.S. 225, 238-239 & n.29 (1972) (noting that the post-Civil War Amendments and Acts of Congress "constitute[d] the federal government the protector of the civil rights") (quoting J. tenBroek, *The Anti-Slavery Origins of the Fourteenth Amendment* 185 (1951)). It is a responsibility that, to be sure, is shared with the States. But in contrast to general criminal law as involved in *Lopez*, civil rights historically has not been an area in which "the States possess primary authority." *Lopez*, 514 U.S. at 561 n.3.

Third, Congress enacted Section 13981 to address a problem that was caused, in part, by pervasive failures in the States' criminal and civil justice systems. See pp. 7-11, *supra*. Indeed, in urging the adoption of the Violence Against Women Act, including the civil remedy of Section 13981, the States acknowledged that their own efforts to deal with the problem had proved "inadequate." 1993 *H. Jud. Hearing* 34-36. A statute premised on such systemic state failures does not presage an open-ended expansion of federal power into domains properly reserved to the States. As the dissent below explained, "nothing more clearly illustrates the basic difference" between the statutes in this case and *Lopez* than that Section 13981 "responded to the states' self-described needs, while the GFSZA added a redundant layer of federal regulation in an area where most states had already acted." Pet. App. 276a.

If a regulated activity poses a genuine threat to interstate commerce, and the States do not adequately address that threat, federalism principles do not prevent Congress from acting and require the threat to go unanswered. Cf. *North Am. Co.* v. *SEC*, 327 U.S. 686, 705 (1946) ("Th[e] broad commerce clause does not operate so as to render the nation powerless to defend itself against economic forces that Con-

gress decrees inimical or destructive of the national economy."). To the contrary, a "demonstrated state failure" may make federal legislation particularly appropriate. Chief Justice William H. Rehnquist, *The 1998 Year-End Report of the Federal Judiciary* 7 (Jan. 1999) (describing recommendations on how Congress might appropriately balance, in the criminal context, jurisdiction between the state and federal courts); see also *Hodel*, 452 U.S. at 281-282 (sustaining federal environmental standards for intrastate coal mining under the Commerce Clause based, in part, on Congress's finding that the States could be deterred by local economic interests from imposing similarly rigorous standards).

Finally, the Violence Against Women Act, of which Section 13981 is a part, is a prototypical example of cooperative federalism. A major purpose of the Act was to encourage, enhance, and enforce the States' own efforts to address gender-motivated violence. For example, Congress imposed federal penalties for interstate violations of state protection orders (18 U.S.C. 2262 (1994 & Supp. IV 1998)), required that state protection orders be accorded full faith and credit (18 U.S.C. 2265), and provided $1.6 billion in grants over six years to assist state, local, and tribal initiatives to combat gender-motivated violence (42 U.S.C. 300w-10, 3796gg, 3796hh, 10409(a), 13931). All of those provisions, and Section 13981, were endorsed by the States themselves. See *1993 H. Jud. Hearing* 34-36. Accordingly, especially when viewed in the context of the entire Violence Against Women Act, Section 13981 is duly respectful of "the federal balance the Framers designed and that this Court is obliged to enforce." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring).

II. SECTION 13981 IS A VALID EXERCISE OF CONGRESS'S POWER TO ENFORCE THE FOURTEENTH AMENDMENT

Section 13981 is also a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment to remedy

state action that denies individuals the equal protection of the laws. Congress found that state justice systems routinely treat violent crimes motivated by gender less seriously than other violent crimes—a disparity that Congress attributed to false stereotypes about gender-motivated violence and its victims, as reflected in state laws, state evidentiary rules, and the attitudes of police, prosecutors, judges, and other state actors. Congress rationally determined that Section 13981, which provides a means of seeking redress for gender-motivated violence that the victim, not the State, controls, is an appropriate remedy for such equal protection violations. Contrary to the court of appeals' conclusion, Congress was not limited to providing victims with a remedy against the State itself—an approach that Congress could have perceived to be impractical as to victims, intrusive as to the States, and inconsistent with the spirit of cooperative federalism.

A. Congress Found Sex-Based Discrimination In State Justice Systems, In Violation Of The Equal Protection Clause Of The Fourteenth Amendment, That Warranted Remedial And Preventive Action Under Section 5 Of That Amendment

Section 5 of the Fourteenth Amendment is "a positive grant of legislative power" to Congress. *City of Boerne* v. *Flores*, 521 U.S. at 517 (quoting *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966)). As this Court recently reaffirmed, "[i]t is for Congress in the first instance to 'determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." *Id.* at 536 (quoting *Morgan*, 384 U.S. at 651); see also *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (opinion of O'Connor, J.) (Congress's power under Section 5 "may at times also include the power to define situations which *Congress* determines threaten principles of equality").

In seeking to identify conduct that violates the guarantee of equal protection, Congress has "wide latitude" and a markedly different role from the courts. *Flores*, 521 U.S. at 520, 535. Congress has a unique institutional capacity to gather information on a comprehensive basis, unconstrained by the limitations of particular litigation and evidentiary rules, and to draw upon the experiences and expertise of the people and communities represented by its Members.[19] Congress is thus not limited under Section 5 to addressing conduct that courts have determined to be unconstitutionally discriminatory. Rather, Congress may apply this Court's definition of the equal protection right to a set of legislatively determined facts and ascertain, in a way that courts cannot, whether and how often, as an empirical matter, government action entails the "indiscriminate imposition of inequalities." *Romer* v. *Evans*, 517 U.S. 620, 633 (1996).

Congress's determination that "bias and discrimination in the [state] criminal justice system often deprive[] victims of crimes of violence motivated by gender of equal protection of the laws," Conf. Rep. 385, is entitled to considerable deference. The extensive record before Congress, which included the reports of some 20 state task forces on gender bias, demonstrated that "crimes disproportionately affecting women," such as rape and domestic abuse, "are often treated less seriously than comparable crimes against men." 1991 S. Rep. 43; see also 1993 S. Rep. 42.

The principal cause of that disparity, according to the evidence presented to Congress, was "improper stereo-

[19] See *Fullilove* v. *Klutznick*, 448 U.S. 448, 502-503 (1980) (Powell, J., concurring) (Congress, unlike the courts, "has no responsibility to confine its vision to the facts and evidence adduced by particular parties"; instead, Congress has a "broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue."); see also *United States* v. *Gainey*, 380 U.S. 63, 67 (1965) ("significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it").

types" concerning gender-motivated violence and its victims. 1991 S. Rep. 39, 49; see also 1993 S. Rep. 38 (noting the "archaic prejudices" that have caused "those within the justice system" to "blame women for the beatings and the rapes they suffer").[20] Those stereotypes were sometimes reflected in state laws, such as marital rape exceptions and tort immunity doctrines, and state evidentiary rules. The stereotypes were far more often reflected in the attitudes of police officers, prosecutors, judges, and other court personnel. 1993 S. Rep. 55; 1991 S. Rep. 45-48, 53-54. In the State of Washington, for example, the gender-bias task force found that "almost a quarter of the judges believed that rape victims 'sometimes' or 'frequently' precipitate their sexual assaults because of what they wear and/or actions preceding the incidents." 1991 S. Rep. 47 n.63. In Maryland, a judicial commission found that "cases involving domestic violence are regarded [by judges] as trivial or unimportant." 1993 H. Rep. 27. In Georgia, a committee of judges found that "police, prosecutors and judges often have gender-biased attitudes about domestic violence" and that rape "victims receive treatment from police, prosecutors and judges which is adversely affected by gender bias." *Id.* at 27-28. In California, the task force found that "police officers, district and city attorneys, court personnel, mediators, and judges—the justice system—treated the victims of domestic violence as though their complaints were trivial, exaggerated or somehow their own fault." 1993 S. Rep. 46; see also pp. 8-10,

[20] See 1991 S. Rep. 39 (noting that "[w]itnesses testified that stereotypes like 'she asked for it,' 'she made it up,' or 'no harm was done' are frighteningly common"); *id.* at 44 (noting the "suspicion" with which rape victims are treated); *id.* at 47 (noting the pervasive "stereotypes" such as that "people who are raped precipitate [it] in some way, whether it be by dress, having a drink in a bar, accepting a ride in a car or accepting a date").

supra (discussing additional evidence of gender bias in state justice systems).[21]

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[21] The record before Congress contained many other examples of bias against victims of gender-motivated violence in state justice systems. See, *e.g.*, *1990 S. Jud. Hearings*, Pt. 1, at 65 ("Cultural stereotypes of women's role in marriage and in society daily distort courts' application of substantive law. Women uniquely, disproportionately and with unacceptable frequency must endure a climate of condescension, indifference and hostility.") (quoting *Report of the New York Task Force on Women in the Courts*, 15 Fordham Urb. L. J. 11, 17-18 (1986-1987)); *1992 H. Jud. Hearing* 70 (testimony of a Florida assistant state attorney) ("[S]ince many [police] officers consider domestic violence to be a private matter, something other than real crime, the failure to properly investigate the case is tolerated and, in fact, in some departments it is even encouraged."); Connecticut Task Force on Gender, Justice and the Courts, *Report* 103-104 (1991) (3% of state judges surveyed "believe that a husband who hits his wife has usually been nagged or otherwise pushed over the edge by her," 6.6% "believe that a woman deserves what she gets if she stays with a man who batters her," and 20.7% "believe that husbands who force sex on their wives are * * * not really rapists"); Illinois Task Force on Gender Bias in the Courts, *Gender Bias in the Courts* 125 (1990) ("[s]ome criminal justice personnel blame female victims for their exercise of judgment, as though they 'assumed the risk' of sexual assault"); *Final Report of the Iowa Equality in the Courts Task Force* 151 (1993) ("[j]udges may question the character of the [domestic abuse] victim or tend to blame the victim for not leaving the abuser"); Kentucky Task Force on Gender Fairness in the Courts, *Equal Justice for Women and Men* 29 (1992) (the "[j]udicial response to domestic violence" is influenced by "[s]tereotypical attitudes and beliefs," with "a substantial number of judges" still "downplay[ing] the seriousness of domestic violence and manifest[ing] a tendency to side with the husband"); Louisiana Task Force on Women in the Courts, *Final Report* 99-100 n.157 (1992) ("[a]ttempts to blame the victim for the crime are not uncommon," citing examples of such attitudes by a police officer and a judge); *Final Report of the Michigan Supreme Court Task Force on Gender Issues in the Court* 35 (1989) ("attitudes [based on stereotypes] limit the effectiveness of the protection provided by law"); *Final Report of the Rhode Island Committee on Women in the Courts* 36 (1987) ("there are other barriers which prevent victims from obtaining effective relief, barriers created primarily by the attitudes of some judges, court personnel and deputy sheriffs"); Utah Task Force on Gender and Justice, *Report to the Utah Judicial Council* S-15 (1990) (police officers' "[s]tereotypes about men and women" affect their response to domestic violence). Other state task force reports not specifically cited by Congress made similar findings. See, *e.g.*, *Report of the Missouri Task Force on Gender and Justice* 37-38 (1993) ("[a] number of witnesses * * * criticized judges' attitudes and the way they handle domestic violence issues," such as "asking the victims what they had done to provoke their partners to hit them" and even "ask[ing] women in court if they like being beaten"); Texas Gender Bias Task Force, *Final Report* 5 (1994) ("Victims of domestic violence face discriminatory attitudes from law-enforcement personnel, prosecutors, judges, and law-makers. Domestic violence is viewed as less serious than other criminal acts, women's experiences are minimized, victims' credibility often is questioned, and battered women are sometimes blamed for causing the abuse.").

It is well established that state action based on inaccurate stereotypes—and, in particular, stereotypes relating to gender—may violate the Equal Protection Clause of the Fourteenth Amendment. See, *e.g.*, *United States* v. *Virginia*, 518 U.S. 515, 532-533 (1996); *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 725-726 (1982); *Craig* v. *Boren*, 429 U.S. 190, 198-199 (1976); see also *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (zoning ordinance that "rest[ed] on an irrational prejudice against the mentally retarded" violated equal protection). Indeed, by the time that Congress was considering the Violence Against Women Act, several lower federal courts had specifically recognized that state actors' failure to treat domestic violence as seriously as other violence may constitute an equal protection violation. See, *e.g.*, *Balistreri* v. *Pacifica Police Dep't*, 901 F.2d 696, 701 (9th Cir. 1990); *Hynson* v. *City of Chester*, 864 F.2d 1026, 1030-1031 (3d Cir. 1988); *Thurman* v. *City of Torrington*, 595 F. Supp. 1521, 1526-1529 (D. Conn. 1984). Here, based on the extensive factual record documenting the States' failure to respond effectively to violent crimes against women due to the "archaic prejudices" of "those within the justice system," 1993 S. Rep. 38, Congress could properly have concluded that violations of equal

protection, under the standard set forth by this Court, were occurring repeatedly in state justice systems across the country.[22]

This is not to suggest that Congress found that any State has, at its highest levels, established a deliberate policy of discriminating against women (or against victims of gender-motivated violence, whom Congress found to be predominantly women). Rather, Congress found, largely on the basis of evidence provided by state task forces and state officials, that many participants in the state justice systems were acting in an intentionally discriminatory manner and that the States' own effort to eliminate such bias had not succeeded and required federal assistance. Such purposeful discrimination by state officials and state employees constitutes state action in violation of the Equal Protection Clause even if it does not implement, and may even violate, state policy. See, *e.g.*, *Hafer* v. *Melo*, 502 U.S. 21, 25 (1991) (actions against state officials in their personal capacities under 42 U.S.C. 1983 based on alleged constitutional violations need not involve a state policy or custom). Congress was entitled to invoke its authority under Section 5 of the Fourteenth Amendment to remedy such violations.[23]

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[22] Congress recognized that many state officials have made efforts to reform their justice systems. But those efforts do not, as the court of appeals appeared to believe (see Pet. App. 155a), make the continuing discrimination by other state actors within the system any less unconstitutional. Congress found that "[d]espite States' most fervent efforts at legislative reform, these stereotypes persist and continue to distort the criminal justice system's response to violence against women." 1991 S. Rep. 39.

[23] Moreover, even if it were not possible to identify any individual state officials or state employees who acted with discriminatory intent, a systemic bias against women, which the States acknowledged but failed to correct, would violate equal protection. Such a systemic bias is not comparable to the inadvertent disparate impact of a nondiscriminatory system as in *Washington* v. *Davis*, 426 U.S. 229 (1976). The systemic bias acknowledged here by the States is necessarily the product of the intentional actions of a multitude of widely dispersed decision-makers. The inability to identify the particular biased actors should not defeat the congressional finding that women have been denied the equal protection of the laws. See *id.* at 241.

B. The Private Right Of Action Created By Section 13981 Is An Appropriate Mechanism To Remedy And Prevent The Constitutional Violations That Congress Identified

Congress has broad discretion under Section 5 of the Fourteenth Amendment in fashioning remedies for violations of constitutional rights. See *Flores*, 521 U.S. at 517-518 ("Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, * * * if not prohibited, is brought within the domain of congressional power.") (quoting *Ex parte Virginia*, 100 U.S. 339, 345-346 (1880)); see also *Morgan*, 384 U.S. at 650 (Section 5 gives Congress "the same broad powers expressed in the Necessary and Proper Clause").

As this Court has made clear, moreover, the question whether Congress may reach particular conduct, in exercising its authority under Section 5, is distinct from the question whether particular conduct violates Section 1. Thus, "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" *Flores*, 521 U.S. at 518 (quoting *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 455 (1976)); see also *J.A. Croson Co.*, 488 U.S. at 490 (recognizing Congress's power under Section 5 to adopt "prophylactic rules").

The private right of action provided by Section 13981 is an appropriate remedy, and a quintessentially legislative one, for the equal protection violations that Congress found in state justice systems. Section 13981 gives victims of gender-

motivated violence "an opportunity for legal vindication," in federal or state court, that "the [victim], not the State, controls." 1990 S. Rep. 42. Section 13981 thus prevents and remedies the discrimination that victims of gender-motivated crimes often face in state justice systems by giving them an alternative means of obtaining legal redress.[24] And, as explained above (see pp. 33-34 & n.18, *supra*), Section 13981 does so in a manner that does not intrude into the operations of state government.

The court of appeals regarded the unintrusiveness of Section 13981 as a vice, suggesting that Congress's only recourse was to regulate state conduct directly. See Pet. App. 157a. That conclusion has no constitutional basis. A remedy that permits victims of gender-motivated violence to seek the vindication that the States have failed to provide is a wholly permissible means of effectuating the purposes of the Fourteenth Amendment. Section 5 does not confine Congress's broad remedial authority to creating causes of action against States and state officials. Congress could otherwise be limited to remedies that it regarded as ineffective or inappropriate. Congress could conclude, for example, that a cause of action against state officials would undermine the cooperation that the Violence Against Women Act sought to achieve among the national, state, and local governments. And an action of that kind would contravene established principles of prosecutorial immunity.[25]

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[24] Section 13981 prevents discrimination by, *inter alia*, enabling victims of gender-motivated violence to avoid resorting to the state justice systems that, in Congress's judgment, would often treat their complaints in a biased manner. Section 13981 remedies discrimination by, *inter alia*, providing a means of vindication for victims who did resort to state justice systems and who, in Congress's judgment, would often experience bias in those systems.

[25] For similar reasons, Congress could decline to make proof of state discrimination an element of Section 13981's cause of action. Indeed, such proof would have made the federal remedy much more costly and cumbersome for plaintiffs and much more intrusive into state functions. See *Flores*, 521 U.S. at 526 (the "new, unprecedented remedies" of the Voting Rights Act upheld in *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), "were deemed necessary given the ineffectiveness of the existing voting rights laws * * * and the slow, costly character of case-by-case litigation").

Congress chose instead to proceed affirmatively to address the stereotypes and other barriers that caused States to deny victims of gender-motivated violence the equal protection of the laws. For example, Congress committed $1.6 billion over six years to support state, local, and tribal efforts to reduce violence against women, including funds for "training law enforcement officers and prosecutors to more effectively identify and respond to violent crimes against women" (42 U.S.C. 3796gg(b)(1)) and "educat[ing] judges in criminal and other courts about domestic violence" (42 U.S.C. 3796hh(b)(6)). Congress also sought to combat stereotypes by making clear to all Americans, including participants in state justice systems, that "attacks motivated by gender [bias] [are] to be considered as serious as crimes motivated by religious, racial, or political bias." 1993 S. Rep. 38; see 42 U.S.C. 13981(b) (declaring that "[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender"). At the same time, Congress recognized that reform of the state justice systems would take time, and so it gave victims of gender-motivated violence a means of obtaining compensation and vindication that otherwise was often unattainable. Those choices are well within Congress's broad discretion to "determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Flores*, 521 U.S. at 536 (quoting *Morgan*, 384 U.S. at 651).

C. Congress's Exercise Of Its Power Under The Enforcement Clause To Enact Section 13981 Is Consistent With This Court's Decisions

1. The court of appeals, relying on *United States* v. *Harris*, 106 U.S. 629 (1883), and the *Civil Rights Cases*, 109 U.S. 3 (1883), ruled that Section 13981 "is invalid, regardless of whether its end is to remedy unconstitutional state action, for the simple reason that it regulates purely private conduct and is not limited to individual cases in which the state has violated the plaintiff's Fourteenth Amendment rights." Pet. App. 126a. The court misread this Court's Reconstruction-era decisions, which do not bar Congress from reaching the conduct of private persons, when Congress does so in order to remedy discrimination by a State or its agents.

In *Harris*, the Court struck down a statute that was premised on the assumption that purely private conduct could violate the Fourteenth Amendment. The statute at issue, Section 2 of the Civil Rights Act of 1871, ch. 22, 17 Stat. 13, outlawed conspiracies among private persons to deprive any person of the equal protection of the law. The explicit predicate for the application of the statute was a finding that private persons had committed an equal protection violation.[26]

The statute at issue in the *Civil Rights Cases* similarly purported to extend the affirmative requirements of the Fourteenth Amendment directly to private persons. The Civil Rights Act of 1875, ch. 114, 118 Stat. 335, established a right to be free of private discrimination in public accommodations. See 109 U.S. at 9.[27] The Court explained that the

[26] See 17 Stat. 13 (making it a crime for two or more persons, "either directly or indirectly," to "depriv[e] any person or any class of persons of the equal protection of the laws").

[27] See 18 Stat. 336 (establishing a right in all persons to "the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement," and making it a crime to violate that right).

critical flaw in the statute was that it did "not profess to be corrective of any constitutional wrong committed by the States"; instead, the statute "step[ped] into the domain of local jurisprudence, and [laid] down rules for the conduct of individuals in society towards each other, and impose[d] sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the State or its authorities." *Id.* at 14.

Unlike the statutes invalidated by the Reconstruction-era Court, Section 13981 is not premised on the assumption that private conduct can violate the Fourteenth Amendment. Instead, Section 13981 remedies and prevents discrimination by the States themselves. Nothing in this Court's precedents bars Congress from regulating private conduct in order to provide a remedy for unconstitutional state action.[28] To the contrary, as Congress declared in enacting the Violence Against Women Act: "While the 14th amendment itself only covers actions by the States, Congress's power to enforce the amendment includes the power to create a private remedy as the most effective means to fight public discrimination." 1993 S. Rep. 55 n.72 (citing *Morgan*, *supra*; *District of Columbia* v. *Carter*, 409 U.S. 418, 423, 424 n.8

[28] This case therefore does not present the question framed by the court below (see, *e.g.*, Pet. App. 97a), namely, when, if ever, Section 5 legislation may address private conduct in the absence of a congressional finding of unconstitutional state action. Compare *United States* v. *Guest*, 383 U.S. 745, 755 (1966) ("rights under the Equal Protection Clause itself arise only where there has been involvement of the State or one acting under the color of its authority," which "is not to say, however, that the involvement of the State need be either exclusive or direct"), with *id.* at 762 (Clark, J, concurring) ("§ 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights"), and *id.* at 782 (Brennan, J., dissenting) (same).

(1973) (that "[t]he Fourteenth Amendment itself 'erects no shield against merely private conduct' * * * is not to say * * * that Congress may not proscribe purely private conduct under § 5 of the Fourteenth Amendment")). Accordingly, Section 13981 is properly viewed as "corrective legislation, that is, such as may be necessary and proper for counteracting * * * such acts and proceedings as the States may commit or take, and which by the [Fourteenth] amendment they are prohibited from committing or taking." *The Civil Rights Cases*, 109 U.S. at 13-14.

2. Nor does this Court's decision in *Flores* call into question the validity of Section 13981 as legislation to remedy and deter violations of constitutional rights.

In *Flores*, the Court held that Congress exceeded its authority under Section 5 of the Fourteenth Amendment in applying the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, to the States, because RFRA appeared to redefine the substantive scope of a constitutional right, rather than simply to enforce a constitutional right as defined under existing law. RFRA was adopted in direct response to this Court's decision in *Employment Division* v. *Smith*, 494 U.S. 872 (1990), which held that the States do not need a compelling justification to enforce neutral, generally applicable laws that burden religious practices. The express purpose of RFRA was to reimpose the earlier compelling interest test. *Flores*, 521 U.S. at 515-516. The Court concluded that the remedy provided by RFRA was wholly disproportionate to any violations of a recognized constitutional right. The Court found that the legislative record lacked evidence of any such constitutional violations, *i.e.*, any generally applicable law that had been enacted in modern times out of religious bigotry. *Id.* at 530. And, even if some small number of such constitutional violations existed, RFRA was too "[s]weeping" in its coverage to "be understood as responsive to, or designed to prevent," them. *Id.* at 532; see *ibid.* (observing that RFRA "intrud[ed] at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter"). The Court therefore concluded that RFRA could not properly be viewed as legislation to "enforce" any recognized constitutional right. Because Section 5 gives Congress the power only to "enforce," not to define, constitutional rights, the Court held that RFRA was not a permissible exercise of the Section 5 power. See *id.* at 519 ("Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause.").

Section 13981 does not redefine the substantive prohibitions of the Fourteenth Amendment. To the contrary, Section 13981 provides an additional remedy for constitutional violations under existing law, *i.e.*, the States' denial of the equal protection of the laws to victims of gender-motivated violence due to "bias and discrimination in the [state] criminal justice system." Conf. Rep. 385. That remedy, moreover, is proportional to the constitutional violations that Congress identified. In contrast to the situation in *Flores*, Congress compiled an extensive record of equal protection violations, which Congress found were frequent, ongoing, and pervasive. See, *e.g.*, 1993 S. Rep. 49 (noting the "overwhelming evidence" contained in "[s]tudy after study" that "gender bias permeates the court system and that women are most often its victims"). And, in contrast to the situation in *Flores*, Congress fashioned an appropriately limited remedy in Section 13981 that in no way intrudes into the operations of state government.[29]

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[29] For similar reasons, Section 13981 does not suffer from the defects that the Court perceived in the Patent Remedy Act, which was held in *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank*, 119 S. Ct. 2199 (1999), not to be permissible Section 5 legislation. In *Florida Prepaid*, the Court emphasized that "Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations." *Id.* at 2207. Congress did identify a pattern of constitutional violations in enacting Section 13981. Moreover, in *Florida*

CONCLUSION

The judgment of the court of appeals should be reversed.
Respectfully submitted.

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Prepaid, the Court noted the Patent Remedy Act's "indiscriminate scope," which would expose a State to liability for "[a]n unlimited range of state conduct." *Id.* at 2210. Section 13981 does not operate against the States at all. And Section 13981 narrowly defines the private conduct that may give rise to liability. See 42 U.S.C. 13981(d) and (e).

APPENDIX

STATUTORY PROVISIONS

42 U.S.C. 13981 provides:

Civil rights

(a) Purpose

Pursuant to the affirmative power of Congress to enact this part under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution, it is the purpose of this part to protect the civil rights of victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender.

(b) Right to be free from crimes of violence

All persons within the United States shall have the right to be free from crimes of violence motivated by gender (as defined in subsection (d) of this section).

(c) Cause of action

A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.

(d) Definitions

For purposes of this section—[1]

(1) the term "crime of violence motivated by gender" means a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender; and

(2) the term "crime of violence" means—

(A) an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of title 18, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States; and

(B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken.

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[1] So in original. The word "means" probably should appear after "(A)" below.

(e) Limitation and procedures

(1) Limitation

Nothing in this section entitles a person to a cause of action under subsection (c) of this section for random acts of violence unrelated to gender or for acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender (within the meaning of subsection (d) of this section).

(2) No prior criminal action

Nothing in this section requires a prior criminal complaint, prosecution, or conviction to establish the elements of a cause of action under subsection (c) of this section.

(3) Concurrent jurisdiction

The Federal and State courts shall have concurrent jurisdiction over actions brought pursuant to this part.

(4) Supplemental jurisdiction

Neither section 1367 of Title 28 nor subsection (c) of this section shall be construed, by reason of a claim arising under such subsection, to confer on the courts of the United States jurisdiction over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree.